

**PUBLIC INTEGRITY COMMISSION
MINUTES
December 19, 2017
10:00 A.M.**

1. Call to Order: 10:00 a.m. Present: William F. Tobin, Jr. (Chair); Bonnie Smith (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Lisa Lessner; Andrew Gonser, Esq.; Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for October 17, 2017: Commissioner Whetzel stated there was a duplicate paragraph in the minutes but wasn't sure where it was located. Motion to accept the minutes as written subject to the removal of any duplicate material. Moved— Commissioner Whetzel, seconded—Commissioner Lessner. Vote 4-0, accepted (Commissioners Anderson and Gonser not present).

Note: Commission Counsel did find a duplicate paragraph in 17-31 (Mike Dunmyer) which was subsequently corrected.

3. Administrative Items (Commissioner Gonser arrives)

Commission Counsel provided training to the City of Milford staff, including the City Council and City employees. Also in attendance were officials from the Town of Millsboro.

Commission Counsel is scheduled to provide training presentation to the Delaware League of Local Governments on June 1, 2018.

4. Elections

Election of new officers. Commissioner Tobin had already served three years as Chairman and was ineligible to serve another one year term in that position. Commissioner Whetzel had served one year as Vice-Chair of Policies and Procedures and Commissioner Smith had served two years as the Vice-Chair of Personnel.

Chairperson: Commissioner Whetzel nominated Commissioner Smith. Seconded by Commissioner Lessner. Vote 4-0, approved (Commissioner Smith not voting).

Vice-Chair of Policies and Procedures: Commissioner Smith nominated Commissioner Whetzel to serve a second term. Seconded by Commissioner Lessner. Vote 4-0, approved (Commissioner Whetzel not voting).

Vice-Chair of Personnel: Commissioner Smith nominated Commissioner Tobin. Seconded by Commissioner Whetzel. Vote, 4-0, approved (Commissioner Tobin not voting).

5. Motion to go into Executive Sessionⁱ to Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Lessner; seconded Commissioner Whetzel. Vote 5-0, approved.

6. 17-41--Post Employment (*Commission Counsel recusing*) (*Commissioner Anderson arrives*)

Upon re-entering the room, Commission Counsel was informed that [Employee] needed to be present because the Commission had questions that were not addressed in [Employee's] submissions. Commission Counsel contacted [Employee] who stated she would be at PIC's offices in approximately 45 minutes. The matter was passed until later in the meeting.

7. 17-35—Post Employment

[Employee] was [a] Manager [at a State agency]. [Employee] managed 15 employees; coordinated the Section training program; coordinated event management; and testified as a State expert when necessary. He retired from State service on December 31, 2017.

[Employee] was scheduled to begin employment with an [Agency] contractor on February 5, 2018. In his new position, [Employee] would be responsible for engineering and operations; data analysis; and systems. [Employee] anticipated he would be working on projects involving [his former Agency]. [Employee] provided a list of existing contracts between [the private company and the Agency], and also indicated which contract he worked on while still a [State] employee. In addition to their regular projects, [the private company] also provided training services to [the Agency's] employees. Other projects included consulting with [a regional entity] and work in Maryland and Pennsylvania.

[Employee] asked the Commission to decide if his position with [the private company] would violate the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same

“matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency employees] who left State employment to work for one of the agency’s contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 *Del. C.* § 5809(5).

The Commission decided that [Employee] could not work on [a specific project] for two years because he was materially responsible for, or gave an opinion about, that project while he was still employed by [the State]. While at the meeting, [Employee] asked the Commission about the possibility of returning to [his Agency] as a consultant where he would work with his former supervisor and former co-workers. The Commission determined that type of work would involve the same basic facts, parties and issues as those he was responsible for while employed at [the Agency]. As a result, the Commission decided he could not return to [the Agency] as a consultant until the expiration of the post-employment restriction.

[The company’s] work in Maryland and Pennsylvania did not fall under the Commission’s jurisdiction. Therefore, [Employee] could work on those projects without violating the post-employment restriction. As to consulting with [the regional entity], his ability to work on that project depended on his involvement, or lack thereof, while he was still an [Agency] employee. [Employee] stated that his prior involvement with [the regional entity] was limited to providing the raw data needed by the group to carry out their mission. The Commission decided his limited interaction with [the regional entity] was not substantial enough to qualify as a matter for which he was previously responsible and decided he could work on [those] projects without violating the post-employment restriction.

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 *Del. C.* § 5805(d).

Motion—[Employee]’s employment with [the private company] did not violate the two year post-employment restriction in the Code of Conduct as long as he did not return to [his former Agency] to work with his former co-workers and supervisor. [Employee] could work on the [regional] project and any out-of-state work. Moved Commissioner Gonzer; seconded Commissioner Whetzel. Vote 6-0, approved.

8. 17-37—Post Employment

On November 17, 2017, Commission Counsel sent [Employee] a guidance letter, at his request, regarding the applicability of the two year post-employment restriction to his post-retirement position with [one of his Agency’s] contractors. [Employee] requested the letter after the cancellation of the November 14, 2017, Commission meeting. He also requested a formal

advisory opinion from the Commission. At the meeting, the Commission voted to endorse Commission Counsel's guidance letter in its entirety.

[Employee] worked for [Agency] and his most recent assignments were located in Sussex County. He retired from State service on November 29, 2017. To aid in determining the applicability of the Code of Conduct's post-employment restriction, [Employee] provided the Commission with a list of the [Agency's] projects he most recently worked on.

[Employee] accepted an offer to work for [a private company] as a Manager. In that role, he would manage [new] projects, as well as work on existing projects. At the time of the meeting, [he had been] assigned him to work on projects in the State of Maryland. [Employee] asked if his employment with [the private company] violated the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the duties and responsibilities during State employment were compared to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency's contractors so long as they

did not work on the same projects. *Commission Ops. 12-09 and 13-41.* As long as [Employee] did not work on any of the projects on the list he provided, his employment with [the private company] did not violate the post-employment restriction. However, [Employee] could not appear before [his former Agency's] bid committees, staffed by employees from his former Section for a period of two years. That did not mean he could not work on those projects, only that he could not appear before the bid committee. It was permissible for him to appear before bid selection committees staffed by [Agency] employees who were not his direct co-workers (i.e. employees from other Sections or Divisions), thus ameliorating the concern he would be interacting with his former co-workers.

The Commission also reminded him of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

Motion—[Employee]'s post-retirement employment with [the private company] did not violate the two year post-employment restriction in the Code of Conduct as long as he did not appear before [the Agency's] bid committees staffed with employees from his former Section for a period of two years and he did not work on any of the projects on the list he provided to PIC. Moved--Commissioner Anderson; seconded Commissioner Smith. Vote 6-0, approved.

9. 17-38 Leah Woodall & Kathryn Tullis—Post Employment Waiver Request

(Because a waiver was granted, the opinion is published in its entirety so the public is assured that the conduct has been approved.)



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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VIA EMAIL

January 5, 2018

17-38--Post Employment--WAIVER REQUEST (GRANTED)

Hearing and Decision By: Bonnie Smith (Chair), William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Lisa Lessner, Andrew Gonser, Esq. (recusing)

Dear Dr. Tullis and Ms. Woodall,

Thank you for attending the Commission meeting on December 19th, 2017. After careful consideration of the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver to allow Dr. Tullis to accept a position with Nemours to administer the newborn screening program. The Commission's reasoning is set forth below.

I. FACTS

Dr. Kathryn Tullis was the Director of the Children and Youth with Special Health Care Needs ("CYSHCN") program within the Department of Public Health ("DPH"). In that role she was the liaison between DPH and other State agencies who provide services to the same client population. As Director, Dr. Tullis supervised the Coordinator of the Newborn Screening Program ("NSP"). NSP contracts with birthing facilities to perform health screening tests on newborns. The program consists of the initial testing (laboratory) phase and the follow-up phase. NSP had been administered by DPH for 40 years and identified over 500 infants each year with potentially life-threatening diseases. During the past three years, Dr. Tullis had acted as the NSP program coordinator in addition to performing her own job duties.

The costs of maintaining the NSP had steadily increased and DPH chose to leave unstaffed positions vacant because of budgetary limits. Budget constraints, coupled with pressure from the birthing facilities to lower their fees, forced DPH to look for other ways to provide the program's services. As a result, DPH issued a Request For Proposal ("RFP") asking bidders to propose alternative ways of accomplishing the NSP's goals. Dr. Tullis assumed the lead role in the RFP process and was a member of the RFP review panel. The bids were independently scored by all members of the review panel and the successful bidder was Nemours.

Nemours posted the position of Manager of the Newborn Screening Program but did not find a qualified candidate. Even though she did not submit an application, Nemours offered the position to Dr. Tullis. Dr. Tullis believed that her knowledge of the program and her existing relationships with birthing facilities and other providers would help ensure a successful transition of the NSP from DPH to Nemours.

Leah Woodall, a DPH Section Chief, wrote separately to support Dr. Tullis' employment with Nemours. Ms. Woodall stated that DPH (and their clients) would benefit from Dr. Tullis' prior experience with the NSP would benefit the State by assuring continuity of care. She also noted that Nemours had reviewed any possible ethics dilemmas which may apply to the hiring of Dr. Tullis and had concluded that there were none. The Commission gave no weight to the fact that Nemours had conducted their own ethics inquiry because their standards are not governed by statute, as is the State Code of Conduct.

Ms. Woodall and Dr. Tullis asked the Commission for a waiver of the two year post-employment restriction to allow Dr. Tullis to work at Nemours as the coordinator of the revised NSP.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Dr. Tullis would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there was a substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. In this case, Ms. Woodall and Dr. Tullis acknowledged that Dr. Tullis would be working on a matter for which she was directly and materially responsible while employed by the State, a violation of the two year post-employment restriction in the Code of Conduct.

The Commission next considered whether DPH or Dr. Tullis qualified for a waiver of the post-employment restriction.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

Dr. Tullis has a background in genetics which, along with her historical knowledge of the NSP program, makes her uniquely qualified to manage the new program. In addition, her oversight will assure continuity of care while the program undergoes a seismic change from a state-run program to a privately-run program, paid for with State funds.

Another consideration which weighed in favor of a waiver was the impending change from testing samples at DPH's laboratory to testing at a private laboratory contracted by Nemours. The State's lab was scheduled to close-out their existing samples and all new samples were to be sent to the new laboratory effective January 1, 2018. The impending deadline made it impossible for Nemours to recruit and train a program manager in the seven remaining work days between the date of the meeting and January 1st.

While some of the problems DPH encountered in transferring the NSP to a private provider appeared to be the result of poor planning by either DPH or Nemours, the Commission decided that the agency had adequately demonstrated the existence of an agency hardship. As a result, the waiver was GRANTED for the above reasons and for the important public policy considerations listed below.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 *Del. C.* § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. "*Ethics in Government Act*," *Senate Report No. 95-1770, p. 32*. In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern.
Id.

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 *Del. C.* § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 *Del. C.* § 5805(d) .
Commission Op. 01-07.

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). (See *Commission Op. 13-34*, State employee could not work for a private entity on a grant that employee wrote while a State employee). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

In this case, Dr. Tullis, and Ms. Woodall, stated that the transfer of the NSP to a private entity would benefit the program and the families of newborns it serves. They anticipate that the Nemours program will provide better follow-up care because they have the resources to staff the positions DPH left vacant due to budget constraints. In addition, they expect the number of false-positives in the testing phase to drop dramatically due to the introduction of a modern laboratory facility that was selected by Nemours. False-positive test results create stress and emotional trauma for the families who have been mistakenly advised that their child may have a life-threatening disease. Obviously, measures to reduce such stressful situations would outweigh any concerns amongst the public regarding the outsourcing of the NSP program.

Another factor which weighed in favor of a waiver was the fact that the decision is a matter of public record. That ensures that the public knows why a former State employee was allowed to work on a State contract in contravention of the Code. After consideration of all the relevant factors, the Commission decided that the public had an important interest in the sustainability of the NSP and the waiver was GRANTED.

III. CONCLUSION

Dr. Tullis is granted a waiver of the post-employment restriction in the Code of Conduct to allow her to accept the position as program manager at Nemours and to allow DPH to work with their former employee.

Sincerely,

/s/ *Bonnie Smith*

Bonnie Smith
Chair

10. 17-45 Crystal Webb & Paul Silverman—Post Employment Waiver Request

(Because a waiver was granted, the opinion is published in its entirety so the public is assured that the conduct has been approved.)



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VIA EMAIL

January 5, 2018

17-45--Post Employment--WAIVER REQUEST (GRANTED)

Hearing and Decision By: Bonnie Smith (Chair), William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); ***Commissioners:*** Jeremy Anderson, Esq., Lisa Lessner, Andrew Gonser, Esq.

Dear Ms. Webb and Dr. Silverman,

Thank you for attending the Commission meeting on December 19th, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver to allow Dr. Silverman to work with DPH for the purpose of creating a program to address the over-prescription of opioid substances in Delaware. The Commission's reasoning is set forth below.

I. FACTS

Ms. Webb is the Deputy Director of the Division of Public Health ("DPH") within the Department of Health and Social Services ("DHSS"). DPH is attempting to address the opioid crisis in Delaware. As part of that effort, DPH secured a grant from the federal government to identify and educate physicians who are prescribing opioids in excess of accepted guidelines. The education efforts would be organized among State agencies and outside contractors. Ms. Webb proposed hiring a former DPH employee, Dr. Silverman to evaluate and report program activities to the federal government and to State agencies. When the grant was originally written, DPH had identified an employee who was to be responsible for the implementation of the program. However, she left DPH before the work on the program began. Ms. Webb stated that DPH's staff was already working at full capacity and some of the deadlines related to the grant were in January 2018. Because time was a consideration, she believed hiring Dr. Silverman would be the fastest and easiest way to implement the program.

Dr. Silverman retired from his position as Associate Deputy Director of DPH on April 1, 2017. He had discussed the program with DPH's Director, Dr. Karyl Rattay, prior to his retirement but he did not have any direct responsibilities for the program. If approved, he would work as a DPH consultant through a temporary employment agency and would work from home. He and Ms. Webb expect he would work approximately one day per week for less than one year. Work Dr. Silverman would complete includes providing the Division of Professional regulation the data necessary to define the target population, approving content for the training program and selecting a vendor to conduct trainings. While Dr. Silverman would have contact with other DPH employees, he would not have contact with anyone who was in his former reporting structure.

Ms. Webb asked the Commission for a waiver of the two year post-employment restriction to allow DPH to contract with Dr. Silverman, a former employee.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Dr. Silverman would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there was a substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Like the matter in *Beebe*, Dr. Silverman worked on the subject matter, public health, while working for the State.

In this case, Dr. Silverman would be working on a new federal grant awarded to the State. However, his involvement with the grant prior to his retirement (i.e. developing the broad concepts of the project and discussing strategy with Dr. Rattay) led the Commission to believe that his involvement with the program after his retirement would violate the two year post-employment restriction in the Code of Conduct

The Commission then turned to a consideration of the waiver request.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

Ms. Webb stated that progress on the grant program was already behind schedule and more deadlines were imminent. Failure to meet the grant's deadlines could lead to a partial forfeiture of the \$4 million federal grant. She further stated that time constraints would prevent DPH from recruiting and hiring another person to perform the work. Ms. Webb believed that Dr. Silverman was the best candidate for the job because he was already familiar with DPH, knew their agency partners and he could begin working on the program immediately.

The Commission decided that given the immediate need to meet the grant's timeline, the agency had adequately justified the existence of an agency hardship.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise

directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) .
Commission Op. 01-07.

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971}. (See *Commission Op. 13-34*, State employee could not work for a private entity on a grant that employee wrote while a State employee). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

The Commission weighed any possible public concern over Dr. Silverman's post-retirement work for DPH against the public's interest in preventing opioid addiction and overdoses. Ms. Webb stated that Delaware had 308 opioid-related deaths in 2016. The grant would pay for education that could not only prevent deaths, but could also prevent addiction from happening in the first place. The Commission also noted that if a waiver was granted that the decision becomes a matter of public record. That ensures that the public knows why a former State employee was allowed to work on a State contract in contravention of the Code.

III. CONCLUSION

The Commission GRANTED your request for a waiver to allow Dr. Silverman to work on the federal grant awarded to DPH based upon agency hardship and because to deny the waiver would not serve the public purpose of the statute.

Sincerely,

/s/ Bonnie Smith

Bonnie Smith
Chair

11. 17-42—Post Employment

[Employee] was formerly [a technology] Manager [for a State Agency]. [Employee] was responsible for the overall management of the [Agency's] system. His duties included installing, upgrading and modifying the system as well as assisting other employees who encountered problems when using the system.

[Employee] retired from State service and accepted employment at [a private company, an Agency] contractor. He was working under the direction of another [employee] and he was not working on any of [the Company's] information technology systems.

[Employee] asked the Commission to decide if his position with [the Company] violated the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Unlike the matter in *Beebe*, [Employee] was not working on projects related to his former State job. Because his State job duties were performed inside the Agency, it was unlikely that he had extensive contact with [the Company], or their projects, prior to his retirement. As a result, there was no overlap between the two positions and no violation of the Code of Conduct’s post-employment restriction.

Motion—[Employee]’s employment with [the Company] did not violate the post-employment restriction in the Code of Conduct. The Commission also reminded him of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d). Moved—Commissioner Whetzel; seconded Commissioner Gonser. Vote 6-0, approved.

12. 17-41—Post Employment (re-addressed from Item #1 on the agenda)

[Employee] was employed by [a State agency] and had also filed to run for elected office in the 2018 elections. [Employee] had questions regarding the applicability of the Code of Conduct’s post-employment restriction to future employment opportunities in and outside the

State of Delaware. In addition, [Employee] filed paperwork with the State Department of Elections [to run for elected office]. She also asked the Commission for advice about her ability to discuss the State's policies, processes and procedures during her campaign.

- I. **For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del. January 29, 1996). In *Beebe*, while employed the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission usually compares the duties and responsibilities during State employment to the post-employment activities. However, since [Employee] had not sought employment in the private sector, the Commission could only offer general advice that applied to matters involving the State of Delaware and the vendor's employed by [her former State Agency]. The advice applied equally to any consulting opportunities she may pursue.

In her State position, she was materially responsible for oversight of the office including policies and procedures. As a result, the Commission decided she could not effectively separate her work for the State into matters for which she was *not* materially responsible. For example, if [Employee] were to accept private employment with one of the [Agency's] vendors, it would appear to the public that she was leveraging her knowledge of the inner workings of the [Agency] to the benefit of a private entity. *Commission Op. 13-48*. That would violate the policy interests served by enforcement of the post-employment restriction on employees leaving government service to work in the private sector, which have been clearly defined by the Courts. In *United States v. Nasser*, the U.S. Court of Appeals upheld the constitutionality of the

“switching sides” prohibition of the federal government’s post-employment restriction found in 18 U.S.C. § 207(a). “[T]he purpose of protecting the government, which can act only through agents, from the use against it by former agents of information gained in the course of their agency, is clearly a proper one.” 476 F.2d 1111, 1116 (7th Cir. 1973).

The Commission advised [Employee] that should she receive a formal job offer or decide to accept a consulting project, she should return to the Commission for more specific advice. In the meantime, she could work on matters related to the other 49 states without restriction.

II. CAMPAIGNING

As to [Employee’s] questions regarding campaign speeches in which she could be called upon to discuss policies and procedures, the Commission did not have jurisdiction over such matters and declined to offer an opinion on the subject. However, she was advised of the prohibition against revealing *confidential* information gained during her employment with the State. 29 Del. C. § 5805(d).

Motion--The Commission recommended [Employee] return for further advice if she actively sought employment, or consulting work, in Delaware. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 6-0, approved.

13. Adjournment—Next meeting January 16, 2018.

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.